IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO.396 OF 2005
WITH
WRIT PETITION NO.397 OF 2005

WRIT PETITION NO.396 OF 2005

1. M/s.Sai Traders,
a Proprietary concern of
Shri Motilal Amonkar,
Shop No.52,
Mapusa Municipal Market,
Mapusa, Bardez, Goa.

2. Shri Motilal Amonkar,
Proprietor of Petitioner No.1,
Mapusa, Bardez, Goad. .. Petitioners

Versus

1. State of Goa,
through Chief Secretary,
having office at Secretariat,
Porvorim, Bardez, Goa.

2. Directorate of Health Services
Government of Goa,
through its Director,
having office at Campal,
Panaji, Goa.

3. Directorate of Food &
Drugs Administration,
Government of Goa,
through its Director,
having office at Altinho,
Panaji, Goa.

4. The Collector,
North Goa District,
Government of Goa,
Panaji, Goa.

5. The Collector,
South Goa District,
Government of Goa,

Margao, Goa.)

6. Superintendent of Police,)
North Goa District,)
Government of Goa,)
Panaji, Goa.)

7. Superintendent of Police,)
South Goa District,)
Government of Goa,)
Margao, Goa.).. Respondents

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S/Shri H.D.Naik and Nilesh Takekar, Advocates for the petitioners.

Shri S.S.Kantak, Advocate General with Ms G.Bhonsale, Additional Government Advocate for the State-respondents.

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WRIT PETITION NO.397 OF 2005

1. M/s.Ghodawat Industries (I))
Pvt.Ltd.,)
a Company incorporated under)
the Companies Act, 1956,)
having its office at)
Plot No.438, Post Box No.118,)
A.A.Chipri - 41611, Via)
Jaysingpur District Kolhapur,)
State of Maharashtra.)

2. Shri Sanjay Dhanchand Ghodawat,)
Son of Dhanchand Ghodawat,)
Indian National, resident of)
Kolhapur, Managing Director)
and Shareholder of Petitioner)
No.1, with his office at)
Plot No.438, P.B.118,)
A.P.Chipri - 416 11,)
Via Jaysingpur District)
Kolhapur.)

3. Sudhakar Matkar & Sons,)
Proprietary concern of)
Shri Sudhakar Matkar,)

having its Shop at Budhwarpeth,)
Ponda, Goa.).. Petitioners

Versus

1. State of Goa,)
through the Chief Secretary,)
with office at Secretariat,)
Vidhansabha Complex,)
Porvorim - Goa.)

2. Directorate of Health Services)
Government of Goa,)
through its Director,)
with Office at Campal,)
Panaji - Goa.).. Respondents

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Shri M.S.Usgaonkar, Senior Advocate with Shri Sudesh Usgaonkar and Ms P.Kamat, Advocates for the petitioners.

Shri S.S.Kantak, Advocate General with Ms R.Chodankar, Additional Government Advocate for the State-Respondents.

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CORAM : R.M.S.KHANDEPARKAR &
N.A.BRITTO, JJ

DATED : 7TH JUNE, 2006

JUDGMENT : (PER R.M.S.KHANDEPARKAR, J)

1. Since common questions of law and facts arise in both the petitions, they were heard together and are being disposed of by this common judgment.

2. The Goa Public Health Act, 1985, hereinafter called as "the Health Act" has been amended by the Public Health (Amendment) Act, 2005, hereinafter called as "the Amendment Act". The petitioners challenge the Amendment Act, on the ground that the same encroaches upon the legislation by the Parliament i.e. the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, hereinafter called as "the Tobacco Act", and Prevention of Food Adulteration Act, 1954, hereinafter called as "Food Adulteration Act" which relate to Entry Nos.33 and 18 respectively of Concurrent List and considering the Entry No.52 of Union List read with declaration under Section 2 of the Tobacco Act, the entire tobacco industry comes under the control of Union and occupies the field, which excludes the jurisdiction of the State to legislate on the subject of tobacco, and therefore, to that extent the Amendment Act is ultra vires for want of legislative competence.

3. Prior to enforcement of the Amendment Act, on 8th November, 2004, the Governor of Goa had promulgated Public Health (Second Amendment) Ordinance, 2004, for short "the said Ordinance". By

the said Ordinance, Section 2 of Goa Daman and Diu Public Health Act, 1985, hereinafter called as "the Health Act', was sought to be amended by substituting the Clause (10) of Section 2, providing definition of 'injurious food' and adding Clause (c), further adding clause (30A) to Section 2 defining the word "sale", and inserting a new Chapter IXA concerning 'Articles injurious to public health' containing Sections 87A to 87L. The changes, which were sought to be incorporated by the said Ordinance, have been replaced and introduced in the Health Act by virtue of the Amendment Act. Meanwhile, on 20th December, 2004, the respondents issued an order and six notifications; one of the notifications was issued in exercise of powers conferred by Section 87A of the said Act, prohibiting consumption, manufacture, sale and distribution of any article of food containing tobacco in the entire State of Goa with immediate effect. Another Notification was issued to declare any article of food containing tobacco to be injurious food for the purpose of Chapter IXA of the said Act. Under four other notifications, the officials attached to combined Food and Drugs Laboratory under Directorate and Food and Drugs Administration were declared to be a Public Analyst under the said Act and certain other officials were authorised for the purpose of

implementation of the said Act. The Amendment Act was published in Official Gazette of Government of Goa on 16th March, 2005 and the implementation thereof commenced from 2nd October, 2005. Consequent thereto, the authorities under the Health Act conducted raids and seized and confiscated the products containing tobacco including gutka in the State of Goa.

4. The grievance of the petitioners is that once the entire control of an industry is brought under the domain of Central Government, the State Legislature cannot enact any law in respect of such industry or the products manufactured by such industry. As per Section 2 of the Tobacco Act, the Union has taken over the control of the tobacco industry, which is a declaration covered by Entry 52 of List I of Schedule VII of the Constitution of India. The Entry 24 in the List II is subject to Entry 52 of List I. Therefore, the product of tobacco stands excluded from the field of the State List. Since the Entry 33(a) of List III deals with trade and commerce in and the production, supply and distribution of the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, it would result in exclusion of the concerned product under Entry 33 of List III

along with the Entry Nos.26 and 27 of List II from the State List. In other words, in view of the Entry 52 and declaration contained under Section 2 of the Tobacco Act, the entire tobacco industry comes under the control of Central Government, and therefore, the Tobacco Act completely occupies the field relating to the product of tobacco, and hence, jurisdiction of the State Legislature in respect of the said subject stands excluded. When the Tobacco Act, which is Central Act enacted by Parliament, deals with the subject of industry of tobacco, any legislation made by the State Legislature directly or indirectly encroaching upon the legislation made by Parliament would be ultra vires, and hence, the provisions of Amendment Act are void. The provisions of the Amendment Act and the notifications issued thereunder are repugnant to the provisions of the Tobacco Act, and therefore, are liable to be quashed. The Amendment Act was preceded by the Ordinance which was, in fact, issued after the Supreme Court's decision delivered on 2nd August, 2004 in the matter of **Godawat Pan Masala Products I.P.Ltd. & Anr. v. Union of India & Ors.,** reported in (2004)7 SCC 68. The Amendment Act is a colourable legislation in as much as the State has no power to prohibit manufacture of any food item permanently in view of the fact that

such power is available under the Prevention of Food Adulteration Act, 1954, and the powers in that regard under the said Act are exclusively vested in the Central Government. In short, the challenge to the impugned legislation is on the ground of applicability of the principle of "occupied field," and resultant absence of jurisdiction to enact any law relating to any product of tobacco.

5. On the other hand, it is the contention of the respondents that Article 47 of the Constitution of India enjoins upon the State to improve the standard of living of the people and improvement of public health. The Entry 6 in the List II of Schedule VII is a legislative field for the State to enact a law in respect of public health. The Amendment Act which has been brought into force is referable to Entry 6 of List II in the Schedule VII, and therefore, is within the legislative competence of the State. Since the legislation is referable to Entry 6 of List II of Schedule VII, Article 254 of the Constitution of India does not come into play. The meaning of the word "industry" in Entry 52 of List I is restrictive and limited to the manufacturing process of that industry, and therefore, even if the control of the tobacco industry is, by law made by Parliament, taken over by

the Union Government, the State is not denuded of its powers to enact a law in respect of that industry in exercise of its powers with reference to different entry in the State List. Though there is a declaration in respect of tobacco industry as required under Entry 52, the State's power to enact a legislation in respect of tobacco industry is not barred. The provisions of the Amendment Act are not inflicted with the provisions of the Tobacco Act. In any case, considering the challenge to the constitutional validity of the statute, the same is to be considered by examining the pith and substance of the Amendment Act.

6. It is well settled that when the challenge to a statute is on the ground that it is ultra vires the powers of the legislature which enacted it, the Court has to primarily ascertain the true character of the legislation. It has to be with regard to the enactment as a whole, while considering its objects, its scope and its effect. If the examination reveals that the legislation is in substance relatable to a matter assigned to the legislature, then its validity has to be upheld, even though it might incidentally trench on matters which are beyond its competence. In such cases, it is always to be remembered, as was

reminded by the Apex Court in **A.S.Krishna & Ors. v. State of Madras,** reported in AIR 1957 SC 297 that "it would be quite an erroneous approach to the question to view such a statute not as an organic whole, but as a mere collection of sections, then disintegrate it into parts, examine under what heads of legislation those parts would severally fall, and by that process determine what portions thereof are intra vires, and what are not."

7. The rule of repugnancy embodied in Article 254(2) of the Constitution is about eclipsing effect of the Central Legislation on the State Legislation when the later seeks to encroach upon the field occupied by the former. Reiterating its view taken in **Zaverbhai Amaidas v. State of Bombay,** reported in AIR 1954 SC 752, the Apex Court in **Deep Chand & Others v. The State of Uttar Pradesh & Others,** reported in AIR 1959 SC 648 held that the principle embodied in Article 254(2) of the Constitution of India is that when there is legislation covering the same field both by Centre and by the Province, both of them being competent to enact the same, the law of the Centre should prevail over that of the State. It was further ruled that the repugnancy between the two statutes should be ascertained on the basis of the three

principles, viz.:-

(1) Whether there is direct conflict or repugnancy between the two provisions;

(2) Whether Parliament intended to lay down an exhaustive code in respect of the subject matter replacing the Act of the State Legislature; and

(3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field.

8. The principle of "occupied field" clearly means that if by reason of the declaration by Parliament the entire subject matter is taken over, for being dealt with by Parliament, depriving the State of the power which it possesses in that regard, then it would follow that the "matter" in the State List is, to the extent of the declaration, subtracted from the scope and ambit of the State List. In other words, if a Central Act has been passed which contains a declaration by Parliament as required by Entry 52, and if the said declaration covers the subject enlisted in the State List, then the State Act on such

subject would be ultra vires, not because of any repugnancy between the two statutes but because the State Legislature has no jurisdiction to pass the law. (Vide: **State of Orissa & Anr. v. M/s.M.A.Tulloch and Co.,** reported in AIR 1964 SC 1284.) Obviously, therefore, when the both, the Parliament and the State Legislatures exercise their powers under the Concurrent List of VII Schedule, and the Central Legislation brings out an exhaustive code in respect of the subject matter and the State Legislation comes out with another Legislation on the same subject, the State Legislation, to that extent, would be repugnant and void. (Vide : **State of Assam v. Horizon Union & Anr.,** reported in AIR 1967 SC 442.)

9. In **Ishwari Khetan Sugar Mills (P) Ltd. & Ors., v. State of Uttar Pradesh & Ors.,** reported in (1980) 4 SCC 136, it was held that when the validity of the legislation is challenged on the ground of want of legislative competence and it is necessary to ascertain which entry in the entry list the legislation is referable to, the court has evolved the theory of pith and substance. If in pith and substance a legislation falls within one entry or the other but some portion of the subject matter of the legislation incidentally trenches upon and might enter

a field under another list, the Statute as a whole would be valid notwithstanding such incidental trenching.

10. In **M/s.Ujagar Prints etc.etc. v. Union of India & Ors.,** reported in AIR 1989 SC 516, it was held that the entries to the legislative lists are not sources of the legislative power but are merely topics or fields of legislation and must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The expression "with respect to" in Article 246 brings in the doctrine of "Pith and Substance" in the understanding of the exertion of the legislative power and wherever the question of legislative competence is raised the test is whether the legislation, looked at as a whole, is substantially 'with respect to' the particular topic of legislation. If the legislation has a substantial and not merely a remote connection with the entry, the matter may well be taken to be legislation on the topic.

11. Article 47 of the Constitution of India deals with the subject of duty of the State to raise the level of nutrition and the standard of living and to improve public health. It provides that the State

shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health. The said Article is comprised under Part IV of the Constitution and Article 36 of the said Part IV clarifies that unless the context otherwise requires, "the State" has the same meaning as in Part III. Article 12 of Part III defines the term "State" as, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

12. Entry No.6 in the State List clearly refers to the subject of "Public health and sanitation, hospitals and dispensaries." The Health Act deals with the law for the purpose of advancing the public health in the State of Goa. Chapter I thereof deals with definition of various terms and expression used in the Health Act. Chapter II enumerates various authorities and their powers under the Health Act. Chapter III

relates to the subject of water supply, and makes provisions for obligation of local authorities to provide potable water to the residents of that respective areas, the power of Government to direct local authorities to execute water works, protection and periodical examination of water supply, action against insanitary sources, etc. Chapter IV deals with the subject of drainage. It deals with the provisions requiring local authority to maintain public drains, provision regarding drains in private streets, drainage for huts, court-yard, passage, construction and closure of cesspools, restriction from the point of view of public health, for establishment of commercial, industry and other establishments and constructions, prohibition for sullage or sewage to be let out into street, prohibition for pollution of water, etc. Chapter V relates to the sanitary convenience. It comprises of provisions for obligation of local authority to provide public sanitary conveniences, mode of construction of latrines, etc. Chapter VI relates to the subject of abatement of nuisances. It declares certain things to be nuisances and provisions for power of Health Officer and local authorities to abate nuisances, for disposal of articles removed while abating nuisance, for prohibition of the deposit of

rubbish, etc. in streets, etc. Chapter VII relates to prevention, notification and treatment of diseases. It declares certain diseases to be infectious and deals with the provisions and maintenance of isolation hospitals and wards, provisions for ambulances, obligation of medical practitioners to give information of certain infections diseases, prohibition of the use of water from suspected source, removal of infected person to hospital, prohibition for infected person from engaging in certain trades and occupations, prevention of infectious diseases transmissible from animals, etc. The Part II of Goa Health Act relates to the various provisions pertaining to the notified diseases. The Part III relates to venereal diseases. The Part IV relates to rule making power and penalty for offences. The Chapter VIII relates to mosquito control. The Chapter IX deals with the subject of sanitation and buildings and Part I thereunder refers to control over insanitary buildings. Part II of Chapter IX relates to abatement of overcrowding. Chapter X relates to fairs and festivals. Chapter XI relates to general power to impose conditions in respect of certain services. Chapter XII deals with the rules, bye-laws, penalties, etc. Chapter XIII relates to appeal against decision of health officer, method of serving

notices, offences to be cognizable etc.

13. The Health Act came into force with effect from 27th November, 1985. By the Amendment Act, implementation of which commenced from 2nd October, 2005, the Health Act is sought to be amended by modifying the clause (10) of Section 2 and by introducing new clauses like (15A) and (30A) in the said Section 2. Simultaneously, new Chapter IXA is sought to be introduced in the Health Act. Section 87A of Chapter IXA deals with the subject of prohibition of dealing in food articles injurious to public health, and Section 87B relates to prohibition in dealing with certain articles of food in designated area. Section 87C relates to the public analyst, Section 87D pertains to power to entry and search, Section 87E pertains to procedure to be followed after seizure, Section 87F pertains to penalty, and Section 87G pertains to punishment for illegal possession in small quantity for personal consumption of any article of food injurious to health or consumption of such article of food. Section 87H relates to cognizance and trial of offences under the Goa Public Health Act. Section 87I thereof pertains to forfeiture of property, Section 87J relates to offences by companies, Section 87K relates to protection of action

taken in good faith, Section 87L provides that the provisions under Chapter IXA shall be in addition to and not in derogation of other provisions or laws.

14. The Section 2(15A) of the Health Act defines the term "injurious food" to mean that the food which upon consumption may cause or is likely to cause injury or is likely to be injurious or has the capacity or tendency to be injurious and cause any harm, damage, injury to the human body or its cells or tissues or any part thereof, and includes all that injurious food which the Government may, having regard to the circumstances, as also its effect use, nature substance or quality, declare, by notification in the Official Gazette, as injurious food for the purposes of Chapter IXA of the Health Act.

15. The Section 2(30A) defines the term "sale", with its grammatical variation and cognate expression, to mean the sale of any article of injurious food, whether for cash or on credit or by way of exchange and whether by wholesale or retail, including free samples for human consumption or use, and includes an agreement for sale, an offer for sale, the exhibition for sale or having in possession for sale of any such article, and includes also an attempt to sell any such

injurious article.

16. Section 87A of the Health Act prohibits dealing in food articles injurious to public health. It provides that no person shall manufacture for sale, or store, exhibit, sell or distribute or in any way deal with any injurious food article used for human consumption. It also empowers the Government to prohibit the consumption, manufacture, sale, distribution, storing or stocking of an injurious articles of food, containing any ingredient and in such quantity which is likely to be injurious to public health.

17. The Section 87B prohibits any substance or article of food containing tobacco or any other ingredients of tobacco, including cigarettes, pan masala, gutkha, beedies, cigars, chewing tobacco being manufactured for sale, sold, stored, stocked or distributed or exhibited for sale or consumed by any person within a distance of 50 meters from the Institutions/places like an educational institution's campus including schools, colleges, university, educational boards, technical educational institutes, training centers, academic workshops, etc., all the religious places or places of worship, all hospitals,

nursing homes, dispensaries, Goa State Legislative Assembly Complex, Goa State Secretariat Complex, All Government buildings, all Court buildings, and Sports complexes, sports stadia, all playgrounds.

18. The challenge in the present petitions is essentially to the provisions comprised under Section 2(15A) and (30A) as also to the Sections 87A and 87B of Chapter IX which have been introduced in the Health Act by virtue of the Amendment Act. It is essentially on the ground that the said provisions encroach the area already occupied by the Tobacco Act, and that therefore, those provisions are bad in law.

19. The Tobacco Act came into force with effect from 1st May, 2004. The statement of Objects and Reasons of the Tobacco Act, undoubtedly, states that a need for comprehensive legislation to prohibit advertising and regulation of production, supply and distribution of cigarettes and tobacco products was recommended by the Parliament Committee on Subordinate Legislation (Tenth Lok Sabha) and the statute seeks to put total ban on advertising of cigarettes and other tobacco products and to prohibit sponsorship of sports and cultural events either directly or indirectly as well as sale of tobacco products to minors, and the

objective of the statute is to reduce the exposure of people to tobacco smoke (passive smoking) and to prevent the sale of tobacco products to minors and to protect them from becoming victims of misleading advertisements. It also states that it would result in a healthier life style and the protection of the right to life enshrined in the Constitution, and further that it seeks to implement article 47 of the Constitution which, inter alia, requires the State to endeavour to improve public health of the people.

20. The preamble of the said Tobacco Act provides that it is an Act to prohibit the advertisement of, and to provide for the regulation of trade and commerce in, and production, supply and distribution of, cigarettes and other tobacco products and for matters connected therewith or incidental thereto. It further provides that it was considered expedient to enact a comprehensive law on tobacco in the public interest and to protect the public health. It further provides that it is expedient to prohibit consumption of cigarettes and other tobacco products which are injurious to health with a view of achieving improvement of public health in general as enjoined by Article 47 of the Constitution, and to prohibit the advertisement of, and to provide for regulation of

trade and commerce, production, supply and distribution of cigarettes and other tobacco products and for matters connected therewith or incidental thereto.

21. Section 2 of the Tobacco Act relates to declaration as to expediency of control by the Union. It provides that "it is hereby declared that it is expedient in the public interest that the Union should take under its control the tobacco industry."

22. Section 3(p) defines the term "tobacco products" to mean the products specified in the Schedule of the Tobacco Act. The Schedule to the Tobacco Act enumerates the products as cigarettes, cigars, cheroots, beedis, cigarette tobacco, pipe tobacco, hookah tobacco, chewing tobacco, snuff, pan masala or any chewing material having tobacco as one of its ingredients (by whatever name called) or gutka, tooth powder containing tobacco.

23. Section 4 of the Tobacco Act prohibits smoking in a public place. It provides that no person shall smoke in any public place provided that in a hotel having 30 rooms or a restaurant having seating capacity of 30 persons or more and in the airports, a

separate provision for smoking area or space may be made. Section 5 of the Tobacco Act deals with the subject of prohibition of advertisement of cigarettes and other tobacco products. Section 6 thereof relates to prohibition on sale of cigarette or other tobacco products to a person below the age of 18 years and in particular area. It provides that no person shall sell offer for sale, or permit sale of, cigarette or any other tobacco product to any person who is under 18 years of age, and in an area within a radius of 100 yards of any educational institution. Section 7 thereof deals with restrictions on trade and commerce in, and production, supply and distribution of cigarettes and other tobacco products.

24. Section 8 of the Tobacco Act provides for the manner in which specified warning shall be made. The term "specified warning" has been defined under Section 3(o) to mean such warnings against the use of cigarettes or other tobacco products to be printed, painted or inscribed on packages of cigarettes or other tobacco products in such form and manner as may be prescribed by rules made under the Tobacco Act. Section 9 thereof deals with the language in which the specified warning shall be expressed. Section 10 of the Tobacco Act makes provision regarding size of

letters and figures of specified warning. Section 11 thereof deals with testing laboratory for nicotine and tar contents in any tobacco products.

25. Section 12 deals with the power of police officers and other officers to enter and search the premises. Section 13 deals with the power of the police officers and other officers to seize cigarettes and tobacco products. Section 14 deals with the subject of confiscation of package containing cigarettes and other tobacco products. Section 15 deals with the power to give option to pay costs in lieu of confiscation. Section 16 clarifies that confiscation of such products cannot interfere with other punishments under the Tobacco Act. Section 17 provides for adjudication for the purpose of confiscation. Section 18 provides that confiscation shall be proceeded by giving opportunity to the owner of the seized packages. Section 19 relates to the provision regarding appeal by the aggrieved persons. Section 20 provides for punishment for failure to give specified warning and nicotine and tar contents. Section 21 provides for punishment for smoking in certain places, and Section 22 of the Tobacco Act provides for punishment for advertisement of cigarettes and tobacco products. Section 23 deals

with the subject of forfeiture of advertisement and advertisement material. Section 24 provides for punishment for sale of cigarettes or any other tobacco products in certain places or to persons below the age of 18 years. Section 25 deals with prevention, detention and place of trial of offences under sections 4 and 6 of the Tobacco Act. Section 26 relates to the offences by Companies. Section 27 provides for offences to be bailable. Section 28 provides for composition of offences. Section 29 provides for protection of action taken in good faith under the Tobacco Act. Section 30 deals with the power to add any tobacco products in the Schedule. Section 31 deals with the power of the Central Government to make rules under the Tobacco Act. Section 32 thereof exempts cigarettes and other tobacco products which are to be exported from applicability of the provisions of the Tobacco Act. Section 33 relates to the repeal and saving of earlier legislation on the subject.

26. Undoubtedly, the Entry No.24 in the State List refers to the subject of "industries subject to the provisions of Entries 7 and 52 of the Union List." Similarly, the subject of trade and commerce as well as the subject of production, supply and distribution

of the goods under Entries 26 and 27 of the State List are subject to the provisions of Entry 33 of the Concurrent List. The Entry 7 of the Union List relates to the subject of industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war. The Entry 52 of the Union List relates to the industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest. Obviously, therefore, the subject of industries under the Entry 24 in the State List excludes the industries which are covered by the Entry Nos.7 and 52 of the Union List. As far as the subject of trade and commerce, production, supply and distribution of goods are concerned, though they are enumerated under Entry Nos.26 and 27 of the State List, the same have been made subject to the Entry No.33 in the Concurrent List. In other words, subject of trade and commerce, production, supply and distribution of goods is within the domain of the State Legislature for enactment of Statutes in relation thereto but the said power is controlled by Entry 52 in the Union List to the extent where the goods relate to the industry of which the control is declared to be of the Union, being expedient to do so in the public interest, consequent to statutory

provision by the Parliament in that regard. This is clear from the Entry 33 under the Concurrent List and the subject under Entries 26 and 27 in the State List being controlled by Entry No.33 in the Concurrent List. As already seen above, the Entry 52 of Union List specifically refers to the subject of industry, control of which is declared to be expedient in the public interest by Union is declared by Parliament by law. Conjoint reading of Entry 52 in the Union List, Entry Nos.26 and 27 in the State List and Entry No.33 in the Concurrent List would reveal that in cases of industries which are brought under the control of Union by a declaration in terms of Entry 52 by an enactment by Parliament on the ground that it is expedient to do so in the public interest, and that the Parliament comes out with an exhaustive legislation on such subject relating to any such industry, the jurisdiction of the State Legislation to make any provision regarding the trade and commerce including the production, supply and distribution of the goods manufactured by such industry would stand excluded. In other words, the subject of trade and commerce, production, supply and distribution of the goods which are not covered by the Entry No.33 of the Concurrent List read with the declaration in terms of Entry No.52 of the Union List are reserved for the

State Legislation. In case, the goods to which the Entry No.33 of the Concurrent List relate, though it is a subject matter of concurrent jurisdiction, theory of "occupied field" will come into picture moment there is Central Legislation on such subject.

27. Perusal of the Tobacco Act would reveal that the Parliament, in no uncertain terms, under Section 2 of the Tobacco Act has declared the tobacco industry to be under the control of Union and such declaration would obviously relate to the Entry 52 of the Union List in the VIIth Schedule. Undoubtedly, considering the need for comprehensive legislation to prohibit advertisement and regulation of production, supply and distribution of cigarettes and tobacco products, the enactment i.e. the Tobacco Act was sought to be brought on the statute book. The statement of objects and reasons of the Tobacco Act clearly states that "the proposed bill seeks to put total ban on advertising of cigarettes and other tobacco products and to prohibit sponsorship of sports and cultural events either directly or indirectly as well as sale of tobacco products to minors. It also proposes to make rules for the purpose of prescribing the contents of the specified warnings, the languages in which they are to be displayed, as well as displaying the

quantities of nicotine and tar contents of these products." Incidentally, it also proposes "to reduce the exposure of people to tobacco smoke (passive smoking)" and further "to protect them (minors) from becoming victims of misleading advertisements." In short, the enactment clearly provides for control over trade and commerce of and production, distribution and supply of the cigarettes and tobacco products. This apparently shows that the Tobacco Act relates to Entry 33 in the Concurrent List read with Entry 52 in the Union List.

28. The Entry No.33 in the Concurrent List nowhere relates to the subject of public health as such. It essentially relates to the trade and commerce as well as production, supply and distribution of goods. In other words, it pertains to commercial aspect of the goods to which the Entry No.33 in the Concurrent List relates. As far as the subject of public health is concerned, it is essentially reserved for the State Legislature under the Entry No.6 of the State List. Feeble attempt was made to contend that the Health Act nowhere relates to the issue of public health but it merely relates to the subject of sanitation. Undoubtedly, the term "sanitation" is commonly understood to refer to the arrangement for disposal of

sewage, but the same implies the arrangement for the provisions to protect the public health. Besides, as already seen above, the Health Act evidently deals with various aspects of the public health and makes important provisions for protection of public health in the State. Indeed, the Government of Goa has brought into force the Health Act since 1985 by exercising its powers in relation to the subject covered by the Entry No.6 of the State List. The Amendment Act is in relation to the Health Act and it pertains to the subject of public health. As already seen above, the various provisions which are sought to be introduced by way of Amendment Act nowhere relates to the trade or commercial aspect of the goods including the goods containing tobacco. The Tobacco Act essentially relates to the commercial aspect of the tobacco goods. Effective implementation of the provisions of Tobacco Act might result in helping the government to bring about healthier lifestyle and in giving protection to the right to life enshrined in the Constitution, and to implement the obligation of the Central Government under Article 47 of the Constitution to that extent, however, it nowhere provides a complete or exhaustive legislation on the subject of public health or relating to the goods injurious to the public health, manufactured or

consumed, either in the form of food or otherwise.

29. It is true that Section 4 of the Tobacco Act speaks about the prohibition for smoking in public place and Section 6 thereof prohibits sale of tobacco products to minors, and the object behind such provisions is albeit to avoid maleffects of the use of tobacco products. However, all other provisions of the Tobacco Act essentially relate to the control of trade and commerce relating to the tobacco products. In contrast, the provisions of the Amendment Act do not relate to the commercial aspect of tobacco products but they relate to all items of human consumption which are injurious to the public health. Undisputedly, the Article 47 of the Constitution mandates the State to raise the level of nutrition and the standard of living and to improve public health and the State under the said Article refers to th Union as well as State Governments. Being so, it is the duty of the Union as well as the State Government to endeavour to improve the public health. Obviously, therefore, while bringing the entire tobacco industries under the control of Union, few provisions are made which will help the government to bring about healthier lifestyle and to protect right to life by controlling or providing restrictions on the

manufacture, sale, distribution and supply of tobacco products by introducing the provisions like the Sections 4 and 6 in the Tobacco Act. However, considering the obligation of the State under Article 47 of the Constitution and exercising the powers in relation to the subject enlisted for the State jurisdiction under the Entry No.6 of the State List, the State Legislature has brought into force the Amendment Act to prohibit the consumption of items which are injurious to the public health and in the process has included even the products containing the tobacco as one of the ingredients being the products prohibited for consumption in terms of the provisions of the Health Act. In short, the Amendment Act essentially relates to the subject of public health, whereas, the Tobacco Act essentially relates to the subject of trade and commerce, production, supply and distribution of the products of tobacco industry which incidentally seeks to perform a duty of the Central Government in relation to the improvement of the lifestyle; but that by itself cannot be sufficient to hold that the entire field relating to the subject of public health which could be affected by the use and consumption of various products including the tobacco products ceases to be the subject for legislation by the State. Incidental trenching of the State

Legislation on the Central Legislation in the matter of use of tobacco products cannot render the Amendment Act to be ultra vires. Scanty provisions regarding prohibition of smoking in public place or sale of tobacco products to a person below the age of 18 years cannot by themselves amount to say that the entire area on the subject of public health which could be affected by the use of harmful products including the tobacco becomes an "occupied field" for the purpose of State Legislation and the same is debarred from enacting necessary legislation on the said subject.

30. In fact, the subject covered by the Tobacco Act is different from the one covered by the Amendment Act. One relates to the industry of tobacco whereas the other relates to the subject of public health providing protection to the public from the use of harmful products including tobacco products. This difference itself is sufficient to reject the contention regarding the applicability of the principle of "occupied field" to the matter in hand. **In fact, in Vijay Kumar Sharma & Ors. v. State of Karnataka & Ors.,** reported in (1990) 2 SCC 562, it was held that:-

"whenever repugnancy between the State and

Central Legislation is alleged, what has to be first examined is whether the two legislations cover or relate to the same subject matter. The test for determining the same is the usual one, namely, to find out the dominant intention of the two legislations. If the dominant intention, i.e. the pith and substance of the two legislations is different, they cover different subject matters. **If the subject matters covered by the legislations are thus different, then merely because the two legislations refer to some allied or cognate subjects, they do not cover the same field.** The legislation, to be on the same subject matter must further cover the entire field covered by the other. **A provision in one legislation to give effect to its dominant purpose may incidentally be on the same subject as covered by the provision of the other legislation. But such partial coverage of the same area in a different context and to achieve a different purpose does not bring about the repugnancy which is intended to be covered by Article 254(2). Both the legislations must be substantially on the same subject to attract the article."**

(Emphasis supplied.)

31. In **P.N.Krishna Lal & Ors. v. Govt. of Kerala & Anr.,** reported in 1995 Supp (2) SCC 187, the legislative competence of the State Legislature to enact Abkari (Amendment) Act 21 of 1984 consisting of Sections 57-A and 57-B was challenged. Taking note of the objective of the said Abkari Amendment Act which was enacted to provide severe penalty for adulteration of liquor or intoxicating drug with the hope to prevent the recurrence of tragic incident which had occurred during the Onam Festival of 1982 which had taken heavy toll of life and left many with loss of eye sights and physical incapacity, and further that Sections 272 to 276 of the Indian Penal Code deal with punishment for adulteration of articles of food, while Prevention of Food Adulteration Act, 1954 also deals with the same topic, and the procedural facet is taken care of by the relevant provisions of the Code of Criminal Procedure, 1973 and the Evident Act, 1872, it was held that :-

> "In determining whether the impugned Act is a law with respect to a given power, the court has to consider whether the Act, in its pith

and substance, is a law on the subject in question. **If the statute relates in pith and substance to a topic assigned to a particular legislature, the Act will not be invalidated even if it incidentally trenches on topics coming within another legislative list. The fact of incidental encroachment does not affect the vires of the law even as regards the area of encroachment.** The court has to ascertain the true nature and character of the subject of the Act or its pith and substance to find whether the impugned Act falls within the competence of the particular legislature. **Blind adherence to strict interpretation which would lead to invalidation of statutes as being legislated in the forbidden sphere should be avoided, lest all beneficial legislations would be stifled at birth and many a subject entrusted to the State legislature rendered ineffectual divesting the State legislature of its power to deal with particular subject of entry or topic."**

(Emphasis supplied.)

It was also reiterated that "the language of an entry

should be given the widest meaning fairly capable to meet the need of the Government envisaged by the Constitution. Each general word should extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended within it. When the vires of an enactment is impugned, there is an initial presumption of its constitutionality. If there exists any difficulty in ascertaining the limits of the legislative power, it must be resolved, as far as possible, in favour of the legislature, putting the most liberal construction on the legislative entry so that it is intra vires."

32. Once it is clear that under the Entry No.6 of the State List, subject of public health is reserved for the State Legislation to legislate upon the said subject, and the Amendment Act being clearly related to the said subject even if it incidentally trenches upon the topics remotely occupied by the Central Legislation in the form of Tobacco Act, that by itself will not render the Amendment Act to be ultra vires. Incidental trenching upon the subject of sale or distribution of the products which aspect might also have been covered by the Tobacco Act, that will not render the provisions of the Amendment Act to be bad in law. Besides, the Amendment Act essentially

relates to the items and goods which are injurious to the health, may be on account of goods containing tobacco but it does not deal with the subject of trade and commerce of such goods but essentially prohibits the consumption of goods which are injurious to the public health. In **State of Andhra Pradesh & Ors. v. Mcdowell and Co. & Ors.,** reported in AIR 1996 SC 1627, it was held that "the concept of occupied field is really relevant in the case of laws made with reference to entries in List-III. In other words, whenever a piece of legislation is said to be beyond the legislative competence of a State Legislature, what one must do is to find out, by applying the rule of pith and substance, whether the legislation falls within any of the entries in List II. If it does, no further question arises; the attack upon the ground of legislative competence shall fail. It cannot be that even in such a case, Article 246(3) can be employed to invalidate the legislation on the ground of legislative incompetence of State Legislature. If, on the other hand, the State legislation in question is relatable to an entry in List-III applying the rule of pith and substance, then also the legislation would be valid, subject to a Parliamentary enactment inconsistent with it, a situation dealt with by Article 254." It was also held that if a statute is

found in substance to relate to a topic within the competence of the legislature, it should be held to be intra vires, even though it might incidentally trench on topics not within its legislative competence. The extent of the encroachment on matters beyond its competence may be an element in determining whether the legislation is colourable, i.e., whether in the guise of making a law on a matter within its competence, the legislature is, in truth, making a law on a subject beyond its competence. But where that is not the position, then the fact of encroachment does not affect the vires of the law even as regards the area of encroachment. Besides, the entries in the Seventh Schedule are merely legislative fields and not the legislative powers. In **Welfare Association A.R.P., Maharashtra & Anr. v. Ranjit P. Gohil & Ors.,** reported in AIR 2003 SC 1266, it was held that the function of the three Lists in Seventh Schedule is merely to demarcate legislative fields between Parliament and States and not to confer any legislative power. The several entries mentioned in the three Lists are fields of legislation. The fountain source of legislative power exercised by the Parliament or the State Legislatures is not the VIIth Schedule but it is Article 246 and other provisions of the Constitution.

33. Similarly, in **Union of India & Ors. v. Shah Goverdhan L. Kabra Teachers' College,** reported in (2002)8 SCC 228, the Apex Court ruled that the power to legislate is engrafted under Article 246 of the Constitution and the various entries for the three lists of the Seventh Schedule are the "fields of legislation", and those entries being legislative heads are all of enabling character and are designed to define and delimit the respective areas of legislative competence of the Union and the State Legislatures but they neither impose any restrictions on the legislative powers nor prescribe any duty for exercise of the legislative power in any particular manner. It was further held that it is a cardinal principle of construction that the language of the entries should be given the widest scope of which their meaning is fairly capable and while interpreting an entry of any list it would not be reasonable to import any limitation therein. At the same time, it was also warned that the rule of widest construction would not enable the legislature to make a law relating to a matter which has no rational connection with the subject matter of an entry, and therefore, when the vires of enactment is challenged, the court primarily presumes the constitutionality of the

statute by putting the most liberal construction upon the relevant legislative entry so that it may have the widest amplitude and the substance of the legislation, that has to be looked into. Undoubtedly, the Court is also expected to guard against extending the meaning of the words beyond their reasonable connotation in its anxiety to preserve the power of the legislature. The Apex Court has also held therein that "when it appears to the court that there is apparent overlapping between the two entries, the doctrine of "pith and substance" has to be applied to find out the true nature of a legislation and the entry within which it would fall. In case of conflict between entries in List I and List II, the same has to be decided by application of the principle of "pith and substance". The doctrine of "pith and substance" means that if an enactment substantially falls within the powers expressly conferred by the Constitution upon the legislature which enacted it, it cannot be held to be invalid, merely because it incidentally encroaches on matters assigned to another legislature. When a law is impugned as being ultra vires of the legislative competence, what is required to be ascertained is the true character of the legislation. If on such an examination it is found that the legislation is in substance one on a matter assigned

to the legislature then it must be held to be valid in its entirety even though it might incidentally trench on matters which are beyond its competence. In order to examine the true character of the enactment, the entire Act, its object, scope and effect, is required to be gone into. The question of invasion into the territory of another legislation is to be determined not by degree but by substance."

34. The objective behind the enactment of the Tobacco Act is to discourage the advertisement and use of tobacco products by imposing certain restrictions in that regard. Ultimately, such measures may result in avoiding supply and distribution of such products to the minors and to that extent to bring about healthier lifestyle. Whereas, the object of the Amendment Act is to ensure maintenance of public health. The resultant effect of implementation of the two statutes may be same to a very limited extent, but that by itself cannot lead to a conclusion that the subject of public health which is reserved for the State Legislation under the Entry No.6 in the State List is controlled by the Entry No.33 of the Concurrent List. In fact, the two statutes are in substance different from one another and have two distinct objects. Merely providing for encouragement

to lead a healthier lifestyle is different from making provisions prohibiting consumption of the products injurious to the health. If the contention on behalf of the petitioners regarding applicability of the principle of "occupied field" to the matter in hand is accepted, then it will virtually result in reading down the Entry No.6 of the State List to be subject to the Entry No.33 in the Concurrent List. That is not the intention of the framers of the Constitution as it is apparent that no such restriction is imposed in that regard, and therefore, the Amendment Act cannot be said to be encroaching upon any occupied field by the Tobacco Act.

35. Referring to Sections 4 and 6 of the Tobacco Act, it was strenuously argued on behalf of the petitioners that the same deals with the required measures against the use of tobacco from the point of view of public health and that the provisions of the Amendment Act are in conflict with those provisions of Tobacco Act, and hence, ultra vires. As already seen above, the Section 4 of the Tobacco Act merely prohibits smoking in the public place, that is the place to which the public has access but not the open space (wide definition of the term "public place" in Section 3(l). However, the term "open space" has not

been defined in the Tobacco Act. Section 6 does prohibit the sale of tobacco products to minors but it does not prohibit smoking by minors. In other words, the measures contemplated under the Tobacco Act relate to certain amount of restraint and regulation of sale, supply and distribution of tobacco products as was recommended by Parliamentary Committee. Merely because resultant effect of the limited measures under the Tobacco Act would be regulation and control of sale, supply or distribution of tobacco products, that by itself is not sufficient to construe the Legislation to be dealing with the subject of public health or effect of the consumption of tobacco products on public health. The legislation in the form of Tobacco Act essentially relates to the subject covered by the Entry 33 of the Concurrent List which entry relates to trade and commerce of the product whereas the Amendment Act relates to the Entry 6 to the State List which entry deals with the subject of public health, the two entries being related to two different and distinct subjects. The latter statute is neither in conflict with the provisions of the former, nor the former is an exhaustive code on the subject dealt with by the latter statute.

36. By no stretch of imagination, it can be said

that the Tobacco Act is a complete Code or an exhaustive legislation on the subject of public health or one dealing with the prohibition or restriction on the use or consumption of tobacco or its products from the point of view of public health. Merely because it may help indirectly or remotely to promote healthier lifestyle in its limited sense or that there are one or two provisions in the statute touching the aspect of healthier lifestyle, that by itself will not be sufficient to call it a legislation on the subject of public health, nor it would be sufficient to divest the State of its field relating to the subject of public health to legislate upon.

37. In **The Hingir-Rampur Coal Co. Ltd. & Ors. v. The State of Orissa & Ors.,** reported in AIR 1961 SC 459, it was held that if Parliament by its law has declared that regulation and development of mines should in public interest be under the control of Union, to the extent of such declaration the jurisdiction of the State Legislature is excluded. The Apex Court therein was dealing with the matter relating to the subject covered by the Entries 23 and 66 of the State List and the former entry itself provides that the field covered thereby is available for the State Legislature subject to the provisions of

Union List with respect to the regulation and development under the control of the Union. The Entry 6 in the State List is not made subject to any such control or limitation. The Apex Court, therefore, clearly held in **Hingir Rampur Coal Co. Ltd.'s case (supra)** that "the limitation imposed by the latter of part of Entry 23 is a limitation on the legislative competence of the State Legislature itself."

38. Undoubtedly, the regular consumption of tobacco containing food articles namely Gutka, Pan Masala can lead to a dreadful disease known as oral sub mucous fibrosis (OSF). OSF is a pre-cancerous condition linked with use of smokeless tobacco products. OSF leads to stiffening of the mouth and an inability to open it and is even more difficult to treat than cancer. An individual suffering from OSF is 400 times more prone to develop oral cancer than any normal person. The studies conducted by experts have shown that the use of indigenous tobacco products like snuff, zarda, khaini, etc., have resulted in India recording the highest number of oral cancer in the world. The ill-effects of tobacco on health and the society have reached alarming proportion. Inspite of the specific assertion of all these facts in the affidavit in reply by the respondents and counter

having been filed by the petitioners, neither those facts have been disputed nor denied by the petitioners.

39. It is true that under the Entry No.18 on the subject of adulteration of foodstuffs and other goods in the Concurrent List, and there is already a Central Legislation on the subject. However, the Amendment Act does not relate to the subject of adulteration of foodstuff or other goods. It essentially relates to the subject of public health as such. The ruling in **Godawat Pan Masala's case (supra)** was on account of notification issued under the Food Adulteration Act by the Government. Obviously, once in terms of the provisions of the Food Adulteration Act long term measures in that regard are reserved for Central Legislation, the State could not have encroached upon the powers of the Central Government and therefore, the provisions in that regard by the State Legislation were held to be bad in law. That does not in any way help the petitioners to contend that the provisions comprised under the Health Act introduced by the Amendment Act are in any way contrary to the provisions of the Food Adulteration Act.

40. Neither the Tobacco Act occupies the field

covered by the Amendment Act nor the later legislation encroaches upon the Central Legislation – either Tobacco Act or Prevention of Food Adulteration Act. Neither the Tobacco Act is complete code on the subject covered by the Amendment Act nor the provisions in the later statute are in conflict with any of those of the former. The two statutes are not repugnant to each other in any manner. The field covered by the Tobacco Act and declaration therein in terms of Entry 52 of the Union List is not the same as covered by the Amendment Act.

41. While dealing with the scope of the term "industry" under Entry 52 of the First List, the Apex Court in **Mcdowell's case (supra)** had categorically observed that "making of a declaration by the Parliament as contemplated by Entry 52 of List-I does not have the effect of transferring or transplanting, as it may be called, the industries engaged in production and manufacture of intoxicating liquors from the State List to Union List. As a matter of fact, the Parliament cannot take over the control of industries engaged in the production and manufacture of intoxicating liquors by making a declaration under Entry 52 of List-I, since the said entry governs only Entry 24 in List II but not Entry 8 in List II."

42. In **Welfare Association's case (supra),** it was also held that a statute is to be construed so as to make it effective and operative on the principle expressed in the maxim "ut res magis valeat quam pereat." (It is better to validate a thing than to invalidate it.) There is a presumption that the Legislature does not exceed its jurisdiction.

43. Other decisions relied upon by the learned advocates for the parties were **S.R.Bomai & Ors. v. Union of India & Ors.,** reported in 1994 3 SCC 1, wherein it was held that while maintaining parliamentary supremacy, one cannot give go-bye to the federalism which has been held to be the basic feature for our consideration. In **Khoday Distilleries Ltd. & Ors. v. State of Karnataka & Ors.,** reported in (1995) 1 SCC 574, it was observed by the Apex Court that it cannot be disputed that certain professions, occupations, trades or businesses which are not in the interests of the general public, may be completely prohibited while others may be permitted with reasonable restrictions on them. In **ITC Ltd. v. Agricultural Product,** reported in AIR 2002 SC 852, it was held that while maintaining parliamentary supremacy, one cannot give a go-bye to the federalism

which has been held to be a basic feature of the Constitution.

44. The notifications under challenge are issued under and in consonance with the provisions of the Amendment Act, and therefore, no fault can be found with those notifications. The challenge to those notifications is also devoid of substance for the reasons stated above.

45. As no other point was canvassed in the matter, in the facts and circumstances of the case, the challenge to the Amendment Act along with the notifications issued thereunder fails, for the reasons stated above. The petitions, therefore, are dismissed. The rule in both the petitions is discharged, with no order as to costs.

(R.M.S.KHANDEPARKAR, J)

(N.A.BRITTO, J)